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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1995

MARVIN ZOLT and ZOLT & LOOMIS, P.C.,

Petitioners,

v.

J. REID BINGHAM, as Ancillary Administrator of the ESTATE OF ROBERT NESTA MARLEY, and DAVID J. STEINBERG,

Respondents.

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Should every new item of damages cause a RICO claim to reaccrue?

2. Can a trial judge, who has propounded to the jury a Rule 49(b) General Verdict with Interrogatories, which he misnamed a Rule 49(a) "Special Verdict", refuse counsel's request to ask the jury two questions needed to resolve an inconsistency between a specific finding and the general verdict, and then give judgment on the general verdict, later "harmonizing" the inconsistency by speculating as to what the jurors' answers might have been had the Court permitted the two questions to be asked?

3. Are attorneys fees in a RICO damages action to be summarily awarded by the Court, based on affidavit, or are they 'a legal right and remedy' created by the statute, and therefore triable by jury?

4. Was the fairness of the trial to petitioners irreparably tainted by permitting their testimony to be interrupted by lengthy scripted Fifth Amendment questioning of a co-defendant, and other similar error?

List of Parties

The only parties to this action are listed in the caption. The plaintiff, an ancillary administrator, is the nominee of Mutual Security Merchant Bank and Trust Company, of Jamaica, West Indies which also appears in the action as a third-party defendant. Petitioners have no knowledge of any parents or subsidiaries.

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 66 F. 3d 553 (App. A). The opinion of the District Court is reported at 823 F. Supp. 1126. (App. B).

Jurisdiction

The Court of Appeals entered judgment on September 28, 1995. (App. C). Rehearing was denied on November 14, 1995. (App. D). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions and Rules Involved

Seventh Amendment

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

18 U.S.C. § 1964(c)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Fed. R. Civ. P. 49(a)

Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Fed. R. Civ. P. 49(b)

General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury

both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

STATEMENT OF THE CASE

(A) The trial

The $6,000,000.00 judgment in this action is based primarily on 18 U.S.C.§ 1964(c). $250,000.00 plus interest was awarded under New York law; the rest is based on RICO.

The gravamen of the complaint is that the defendants helped Rita Marley, the Jamaican decedent's widow, co-administrator, and chief beneficiary, and the mother of four of decedent's beneficiaries, to receive more than her share of the Estate, and to divert royalty income to corporations under her control,[1] which should instead have been sent to the plaintiff, the bank co-administrator of the decedent's estate in Jamaica. ("Mutual Security").

The "fraud" was allegedly accomplished by misleading Mutual Security, the theory being that by defrauding Mutual Security--one of three co-administrators-- defendants defrauded "the Estate."

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[1] The Second Circuit panel, demonstrating its incomplete grasp of the record, incorrectly stated in its opinion that petitioners were found to have "diverted foreign music assets and royalty income from Marley's estate *to themselves*".(emphasis supplied). This was not found to have occurred, and there would have been no basis in the record for such a finding to have been made. Although allegations of that nature were made by plaintiff's counsel both prior to trial and during plaintiff's counsel's opening statement, plaintiff's counsel thereafter commendably abandoned such claims when plaintiff's own expert witness -- an accountant from a large accounting firm -- testified that the moneys received by petitioners, over a period of six years in which they rendered extensive accounting services to the Estate, were *not* excessive. See 810 F. Supp. at 102.

Decedent died on May 11, 1981.

Mutual Security was approached by the decedent's Jamaican lawyer to become co-administrator. On June 3, 1981, months prior to its appointment as a co-administrator, Mutual Security made its first inquiries about the decedent's assets.

In December, 1986, alleging RICO and other violations, Mutual Security brought suit, in the United States District Court for the Southern District of New York, against the decedent's American lawyers and accountants, located in Philadelphia and New York.

The widow, although the alleged recipient of the moneys allegedly "diverted" by the "schemes", was not named as a defendant.

At trial the first witness plaintiff called was the defendant Marvin Zolt. Judge Conboy permitted several weeks of examination of Mr. Zolt by plaintiff's counsel, consisting almost exclusively of lengthy leading questions, to which Judge Conboy ordered Mr. Zolt, on pain of imprisonment, to answer each question "yes" or "no", and forbade him from explaining why any of these lengthy leading questions could not be properly answered by a "yes" or "no".

During the remainder of the trial, Judge Conboy instructed other witnesses that they did not have to respond "yes" or "no" if the question did not lend itself to such an answer--the exact opposite of the instructions he had given Mr. Zolt.

The examination of Mr. Zolt by plaintiff's counsel was continuous, except for interruption by two days of "testimony" of defendant David Steinberg, in which Mr. Steinberg was asked hundreds of questions, many of them referring to Mr. Zolt, to which Mr. Steinberg's response was the invocation of the Fifth Amendment.

(B) The RICO limitations issue.

After three (3) months of trial, after being presented with proposed Special Verdict Sheets, the trial judge presented the jury with a 72-question document which he denominated a "Special Verdict Sheet", although it fit the description not of a "Special Verdict" under Fed. R. Civ. P. 49(a), but of a General Verdict under Fed. R. Civ. P. 49 (b).

Under the section entitled "The Statutes of Limitations", the jurors were asked the following question:

> 52. Place a check mark next to the earliest date as to which the Estate had actual knowledge of the defendants' wrongful acts:
>
> June 1986_____
> March 30, 1984 ____
> December 10, 1983 ____
> March 30, 1983 ____
> December 10, 1982 ____

Since December 10, 1982, was more than four (4) years prior to commencement of this action, it was agreed by the judge, the plaintiff, and the defendants, that the RICO claim would be time barred if discovered on or before that date.

The case was tried on that theory, and abundant evidence educed--especially during the cross-examination of Mutual Security's Louis Byles--that the plaintiff had indeed discovered the allegedly wrongful acts long prior to that date, even prior to its appointment as a co-administrator, and indeed had been aware of the decedent's estate's assets in the United States on June 3, 1981, the first day it asked questions.

After two (2) weeks of deliberation, the jury checked off December 10, 1982, the earliest date on the sheet.

Inexplicably, the trial court nevertheless awarded

judgment to plaintiff on the RICO claim.

(C) The inconsistency.

In addition to supposedly settling the RICO limitations question, the jury's answer to question 52 raised an inconsistency going to the merits of both the RICO and state law fraud claims.

While the jurors were still impanelled, and in their seats, the attorney for the petitioner, at sidebar, pointed out to the trial court the logical inconsistency between the jurors' general verdict that plaintiff had been defrauded and their specific finding, in response to interrogatories, that the plaintiff had "actual knowledge of the defendants' wrongful acts" as of the earliest date presented to them. Counsel requested that the jurors be asked the following two questions, the answers to which would either (a) remove the inconsistency, or (b) make it clear that the jury had not understood the definition of fraud:

> State whether the estate had actual knowledge of the wrongful acts of defendant Marvin Zolt prior to December 10, 1982?
>
> If the answer to the foregoing is "yes", state when the estate acquired actual knowledge of the wrongful acts of Marvin Zolt.

The judge refused. And when counsel asked "may I be heard on that?", the judge responded: "No".

The judge thereafter dismissed the jurors.

(D) The RICO attorneys fee award.

Throughout the litigation, and during the trial as well, the district judge completely foreclosed inquiry into the issue of RICO attorneys fees, implying that this would be permitted after a finding of liability. Subsequent to the judgment, over petitioners' objections that they were entitled to discovery, trial, and jury trial on the issue, the court awarded plaintiff $3,000,000.00 in RICO attorneys fees on the basis of an affidavit of plaintiff's counsel.

(E) Post-trial proceedings.

Post-verdict and post-judgment motions were made; the district court adhered to its positions.

(F) The appeal in the Second Circuit.

The Second Circuit affirmed the district court in each and every respect.

REASONS FOR GRANTING THE WRIT

1. The RICO claim was time barred.

The RICO statute is silent as to its limitations period. In *Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143 (1987), this Court prescribed a four-year limitations period, but left open the question of accrual.

The Second Circuit's opinion practically pleads with this Court to offer guidance on the accrual issue: "The result has been a split among the circuits generating as many as half a

dozen conflicting accrual rules." 66 F.3d at 558.

The hopeless confusion of the Second Circuit is exemplified by the irrational decision it reached in the instant case.

Although the jurors expressly found as a fact that the plaintiff had acquired actual knowledge of all of the defendants' wrongful acts more than four (4) years prior to commencement of the action, the trial judge nevertheless awarded judgment to the plaintiff under RICO, on the ground that each occurrence of *damages* was a "new and independent injury" within the meaning of the Second Circuit's decision in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989).

Such an expansive reading of *Bankers Trust*--which would in essence result in no RICO claim ever being time barred so long as damages continue to accrue--was subsequently rejected by a panel of the Second Circuit in *Long Island Lighting Co. v. IMO Industries Inc.*, 6 F. 3d 876 (2d Cir. 1993), as it had previously been rejected by the Third Circuit in *Glessner v. Kenny*, 952 F. 2d 702 (3d Cir. 1991), and by the well-reasoned decision of Judge Freeh in *Ackerman v. National Property Analysts, Inc.* 887 F. Supp. 494 (S.D.N.Y. 1992).[2]

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[2] Judge Conboy, in his June 16, 1993, post-judgment decision, purported to rationalize the result by saying that the jury expressly found that all the RICO damages occurred subsequent to December 31, 1982. However, an examination of the verdict sheet shows that that was the *only* time period Judge Conboy *inquired into* on the subject of damages. The pertinent damages questions were posed as

[Footnote continued on next page]

The Second Circuit panel, apparently recognizing the illogic in Judge Conboy's reasoning--but nevertheless reaching out to find grounds for affirmance against the confusing matrix of its own decisions--developed an entirely different explanation for the result, one which was also fatally irrational, because it contradicted the jury's express findings:

> We think the instant case is closer factually to *Bankers Trust* than to either *LILCO* or *Cruden*, as it involves a continuing series of *fraudulent actions* undertaken to divert and conceal assets and income... As a consequence, *with each*

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follows:

> 57. ...[W]hat is the dollar amount of damages that will compensate the Estate for its RICO injury?
>
> 59. [W]hat is the dollar amount of damages that will compensate the Estate for its common law injuries?
>
> 60. What amount in dollars, of the damages you found in questions fifty seven and fifty-nine, do you find the Estate of Robert Nesta Marley suffered after each of the following dates?
>
> Subsequent to March 31, 1984 $_____
> Subsequent to December 31, 1983 $_____
> Subsequent to March 31, 1983 $_____
> Subsequent to December 31, 1982 $_____

Thus the trial court erroneously equated each new item of *damages* with a "new and independent injury" and, in an astonishing example of circular reasoning, *assumed* that no damages occurred before December 31, 1982, when it had only asked the jury what damages occurred *after* December 31, 1982. (Indeed, the largest single item of alleged "damages" was a $1,000,000.00 royalty check from Almo Records, which had been deposited in late June, 1981.).

diversion a new civil RICO cause of action accrued, with a corresponding four-year limitations period...

66 F.3d at 561. (emphasis supplied).

There are only two ways to read this confusing passage. Either the Second Circuit is saying that new wrongful acts occurred during the four-year period prior to commencement of suit, thereby *impermissibly violating the petitioners' Seventh Amendment rights by overruling the jury's express finding that all of the wrongful acts had occurred prior to that period,* or it is saying that the new acts were not wrongful, in which it is *sub silentio* agreeing with the trial judge's outlandish holding that the mere accrual of new damages causes the RICO claim to reaccrue as well.

The Second Circuit cannot fairly, rationally, and predictably apply the "rule" which it has itself sought to create: the "separate accrual" rule which provides that the RICO claim reaccrues upon "independent injury".

It is respectfully submitted that the reason the Circuit cannot apply the "rule" is that the rule is by its very nature a quagmire, and an invitation to disaster. The separate accrual rule not only invites, but mandates, highly philosophical and subjective debate as to the distinction between "damages" and "injuries", and contradicts the fundamental concept of any RICO claim, since a RICO claim does not come into being as the result of any number of "independent" injuries, but as the result of a "pattern". *Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. at 154.

This Court should, it is respectfully submitted, end the wild discord among the Circuits, and adopt the most rational of the RICO accrual principles--the "discovery rule". *See, e.g., Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.* 906 F.2d 1546 (11th Cir. 1990).

But whichever rule this Court adopts, reversal should be the result here. Under either the "discovery" or the "separate accrual" rule, the judgment in the instant case logically must be reversed, because all of the elements of the RICO claim--if they were present at all--were clearly present and known to plaintiff prior to December 10, 1982, and nothing occurred subsequent to that date, according to the jury, other than the occurrence of new "damages".

Even were this Court to adopt the separate accrual rule enunciated by the Second Circuit in its previous decisions, reasoned application of that rule to the jury's findings mandates dismissal.

The RICO claim in this case was time barred and should be dismissed.

The irrationality of the District Court in concluding that the occurrence of new damages caused the claim to re-accrue, and the irrationality of the Circuit Court in concluding that new wrongful acts had occurred although the jury had found otherwise, demonstrate the state of confusion in which these Courts find themselves, and exemplify the need for the Supreme Court to step in and establish a just, workable, and uniform rule governing RICO accrual.

2. The trial court erred in refusing to ask two questions needed to resolve an inconsistency, and then reconciling the inconsistency by speculating as to what the jurors might have responded had they been asked.

The jury held, in the generalized section of the "special verdict" form, which was in reality the "general verdict" section of a Rule 49(b) General Verdict With Interrogatories, that petitioners were guilty of fraud, both under RICO and under

New York law. (The Court had declined defendants' request for a genuine Special Verdict form.).

However, as noted earlier, when asked a very specific question as to when plaintiff acquired "actual knowledge of the defendants' wrongful acts", the jurors picked the earliest date offered to them. (This happened to be December 10, 1982, a date selected because it was, or at least was supposed to be, the RICO cutoff date : i.e., a date selected arbitrarily because it was a date which all parties agreed was more than four years prior to commencement of the action.).

Since plaintiff's actual knowledge of the allegedly wrongful acts was diametrically inconsistent with the essential elements of deception and reliance required for a finding of fraud, petitioners' counsel pointed out the possible inconsistency to the trial judge, and requested that the Court ask the jurors two additional questions:

> State whether the estate had actual knowledge of the wrongful acts of defendant Marvin Zolt prior to December 10, 1982?
>
> If the answer to the foregoing is "yes", state when the estate acquired actual knowledge of the wrongful acts of Marvin Zolt.

There had been substantial evidence at the trial, especially during the cross-examination of Mutual Security's Louis Byles, to the effect that Mutual Security was aware of the allegedly "wrongful" way in which Bob Marley, and after his death Rita Marley, handled the Bob Marley offshore royalty income, from the very first day Mutual Security got involved with the Marleys, which was June 3, 1981.

If the plaintiff at all pertinent times had knowledge of defendant's "wrongful acts", the possibility of "fraud" against the plaintiff would be negated.

If, on the other hand, plaintiff acquired its "actual

knowledge" some time between June 3, 1981, and December 10, 1982, then the jury finding of fraud would have been "harmonized".

The judge refused to find out; he refused to ask the questions; he even refused to hear counsel out on his reasons for proffering the questions while the jury was still present.

He chose instead to dismiss the jury and leave the verdict under a perpetual, and unnecessary, cloud.

With eight months to think about his mistake, the only way the trial judge was able to "harmonize" the inconsistency was to speculate on what the jurors *might* have responded were they asked the very same questions he had *refused* to ask them: he guessed that the jurors might have concluded that plaintiff relied on defendants' alleged misrepresentations "through 1981 and up to December 10, 1982". 823 F. Supp. at 1131.

His decision made no reference at all to the fact that he had been explicitly requested by counsel to ask the jury about that time period, and had refused to do so, although reminded of this fact by petitioners' motion papers.

The Second Circuit joined the trial judge in making the same guess, ignoring the fact that it was petitioners' right to have that ambiguity resolved by the jury, not by judges, and avoided the issue which the trial judge himself had avoided: whether it was an impropriety on his part to refuse to ask the questions.

The Second Circuit held only that "the district court's reconciliation was a fair explanation that eliminated the alleged inconsistency", a conclusion with which we would not take issue *had the ambiguity first been raised by petitioners eight months after the verdict, rather than when it was raised, with the jury still in the jury box.*

Both the trial judge and the Second Circuit have declined to address the real issue, which is the impropriety of

the district court (a) mixing up Fed. R. Civ. P. 49(a) with Rule 49(b); (b) creating a "special verdict" form that was really a Rule 49(b) general verdict accompanied by interrogatories; (c) ignoring the mandate of Rule 49 (b) that specific findings of fact cannot be overruled by inconsistent general verdicts; (d) rudely ignoring the advice of counsel--while the jury was still impanelled--of a major inconsistency between a specific finding and the general verdict; and (e) choosing to make its own guess as to what the jurors might have been thinking, instead of just asking them.

This conduct deprived petitioners of their right to trial by jury of a major issue in the case, and warrants reversal of the judgment below.

3. The RICO attorneys fee award was improperly awarded in summary fashion.

Throughout the litigation, the Court consistently foreclosed petitioners from inquiring into the RICO attorneys fees issue, always stating that the issue was being raised prematurely, and implying that it would be dealt with later in plenary fashion, if and when a finding of RICO liability was made.

Subsequent to the trial, the Court held plaintiff to be entitled to a RICO attorneys fee award, and directed plaintiff's counsel to submit an "accounting".

The "accounting" plaintiff submitted was an affidavit.

Petitioners, declining to be drawn into a war of affidavits and thus risk possible waiver of their right to fully litigate the attorneys fee issue, reminded the district court that, under applicable principles of law, 18 U.S.C. §1964(c)--by creating a right to sue for attorneys fees under RICO-- "creates legal

rights and remedies, enforceable in an action for damages in the ordinary courts of law" within the meaning of *Curtis v. Loether*, 415 U.S. 189 (1974), and that the attorneys fees are therefore subject to the parties' rights to discovery, trial, and jury trial, and reserved their rights to those procedural safeguards.

The Court nevertheless proceeded to award plaintiff more than $3,000,000.00 in attorneys fees, based solely on plaintiff's counsel's affidavit.

This, too, was error.

As this Court held in *Curtis v. Loether*, 415 U.S. 189 (1974), the Seventh Amendment right to a jury trial for actions at common law applies to "actions enforcing statutory rights, and requires a jury trial on demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."

Attorneys fees--in this case $3,000,000.00 in attorneys fees--are certainly a "legal right[...] and remed[y]".

Both the trial judge and the Second Circuit chose to *completely ignore* the decision of this Court in *Curtis v. Loether, supra*, although petitioners cited the case to both courts.

This, too, was reversible error, although one which, concededly, need not be reached if this Court reverses on the ground that the RICO claim was time barred.

4. Petitioners were deprived of a fair trial.

The first witness plaintiff called was the defendant Marvin Zolt. Judge Conboy permitted several weeks of

examination of Mr. Zolt by plaintiff's counsel,[3] consisting almost exclusively of lengthy, stylized, and theatrical leading questions, of the "when did you start beating your wife" school of trial advocacy.

Judge Conboy ordered Mr. Zolt, *on pain of imprisonment,* to answer each question "yes" or "no" and forbade him from explaining why any of these lengthy leading questions could not be properly answered by a "yes" or "no". (During the remainder of the trial, Judge Conboy regularly instructed all other witnesses that they did not have to respond "yes" or "no" if the question did not lend itself to such an answer -- the exact opposite of the instructions the Court had given Mr. Zolt).

The defendant Mr. Zolt is an accountant. He was 72 years old at the time of trial. His sole involvement with the Marleys was as one of their accountants. Yet for a period of two (2) weeks, he was examined almost exclusively on legal matters, rather than accounting matters, all of which had occurred from ten (10) to sixteen (16) years prior to the trial.

Plaintiff's counsel saw fit to commence the trial with three weeks of such "testimony" by Mr. Zolt, almost all of which was taken in a "cheap shot" manner.

In almost every instance Mr. Zolt was asked a leading question. Plaintiff's counsel purposefully confined himself mostly to questions which -- based on (a) Mr. Zolt's 16 deposition transcripts and (b) the laws of nature as to what a 72

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[3] This singularly uninformative and prejudicial examination was interrupted by two equally prejudicial and uninformative days of co-defendant David Steinberg taking the Fifth Amendment in response to similar, scripted questions to which plaintiff's counsel knew the answer would be Mr. Steinberg's invocation of the Fifth Amendment

years old man can remember -- would have to be, in words or in substance, "I don't know" or "I don't remember". Then, as if to impeach Mr. Zolt's credibility, counsel would produce a document -- inevitably a completely innocuous, undisputed, and unexceptionable document--and in imperious and theatrical language, elicit, one-by-one, the witness's recitation of the contents of each paragraph or sentence therein contained.

Often the witness could not authenticate or recognize the document at all, but was nevertheless forced to recite its contents to the jury, anyway.

Instead of discouraging this overly time-consuming, intellectually dishonest, charade, the trial judge reveled in it, compounding the prejudicial nature of this empty exercise by repeatedly (a) intervening in the questioning in a prosecutorial mode, (b) himself asking unfair and misleading questions of the witness in a disbelieving and disrespectful manner, (c) asking leading questions which contained inappropriate suggestions of unproved and unprovable "facts", (d) acting as if he had superior knowledge of the facts than the witness, almost as if he had personally been present at the time of the events in question, (e) consistently overruling the well-taken objections of defendants' counsel, (f) threatening defendants' counsel not to make objections in accordance with the rules of evidence, (g) threatening Mr. Zolt with *imprisonment* unless he answered "yes" or "no" to these entirely improper questions, (h) repeatedly volunteering uncalled for, disparaging remarks about Mr. Zolt at sidebar, and seeking to discourage co-defendants' counsel from objecting to questions directed to Mr. Zolt, (i) ruling that Mr. Brundige's repeated questioning of Mr. Zolt on matters as to which he had no recollection did somehow constitute evidence in chief of the "facts" suggested by the leading questions, (j) ruling that Mr. Zolt's lack of knowledge or recollection of these matters constituted affirmative evidence

that he was "lying", and (k) showing undue deference to plaintiff's counsel, frequently asking him -- in the presence of the jury -- if he "objected" to a proper objection raised by defendants' counsel, as if it were plaintiff's counsel -- rather than the trial judge -- who was presiding.

Although it is fundamental that a party may not prove an issue on which he has the burden of proof by simply calling the opposing party to the stand, posing questions to him, and urging the jury to disbelieve the witness's answers *[see, e.g., Bose Corp. V. Consumers Unions, 466 U.S. 485, 512 (1984)]*, the trial judge repeatedly overruled objections made by defendants' counsel in this regard. The following exchange is illustrative:

> [sidebar]
>
> MR. FINK: Your Honor, again, and I apologize for perhaps being repetitious, but this entire morning has been leading questions which are improper, but a lot of facts that appear now to be established where almost the entire story of asking questions and then responses of I don't recall, and I'm very concerned that the jury now has a complete picture, but there is really very little in the evidence.
>
> THE COURT: They can draw the inference that he is lying.
>
> MR. FINK: They can
>
> THE COURT: Yes.

Plaintiff's counsel was permitted by the judge to repeatedly browbeat Mr. Zolt and even to ask him series of questions -- in a pompous and incriminating manner -- as to what Mr. Zolt *did not recall*, as if Mr. Zolt's failure to remember what had occurred at a meeting eleven (11) years earlier was evidence of something:

Q. *Isn't it a fact, Mr. Zolt, that you don't recall* whether or not there were any discussions at the Coudert meeting on June 26, 1981 as to who would be the ultimate beneficiary of the Netherlands Antilles company?

A. Yes.

Q. *Isn't it also a fact, sir, that you don't recall* whether there were any discussions as part of that presentation by Coudert Brothers that the BVI companies would be liquidated?

A. Yes.

Q. *And isn't it also a fact, sir, that you don't recall* whether there were discussions at a Coudert Brothers' meeting with respect to whether arrangements would be made for the transfer of Bob Marley's stock in his BVI companies to Rita Marley?

A. Is it a fact that I don't recall?

Q. Right.

A. Yes.

Q. *And isn't it also a fact that you don't recall* whether or not there was discussed any thing there at that meeting regarding the three BVI companies?

A. Yes.

Additionally, although the Court and plaintiff's counsel advised defendants there would be 20 to 30 minutes of 'scripted' Fifth Amendment questioning of defendant Steinberg, the Court permitted the plaintiff's highly prejudicial and unnecessary exercise to go on over a period of almost two days, in the middle of Mr. Zolt's examination, thus casting a dark shadow over the entire proceedings. The Fifth Amendment exercise was not even remotely calculated to advance the fact-finding process; its sole purpose was to taint the proceedings.

As a result of this bizarre inquisition, sanctioned, dominated, and even at times conducted, by the trial judge information which could have been presented in 2 days took 3 weeks, and was presented in a deceptive manner.

The first three weeks of the trial consisted of no more and no less than the systematic humiliation of a defendant, in order to create an atmosphere -- with "smoke" rather than evidence -- of guilt.

Such Star Chamber tactics have no place in a federal court.

CONCLUSION

The RICO claim was time barred, and must be dismissed, along with the accompanying attorneys fee award.

In view of the trial court's deliberate refusal to resolve the inconsistencies in the jury's verdict as to the state law fraud claim, despite counsel's explicit request that it do so while the jurors were still impanelled, and in view of the Court's otherwise unfair and prejudicial conduct of the proceedings, the state law fraud claim should be retried.

Respectfully submitted,

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